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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452

IN THE MATTER OF CHARLES A. McCULLOCH, DEBTOR.

CHARLES A. McCULLOCH,
Petitioner,

vs.

WILBUR L. LOFTUS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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I.

Statement of the Case.

Inasmuch as petitioner has failed to serve a copy of the printed record on counsel for the respondent, as required by Section 3 of Rule 38 of the Rules of this Court, it will be necessary throughout this brief to refer to the transcript of the record which was filed September 15, 1940, in the United States Circuit Court of Appeals for the Seventh Circuit.

On June 27, 1939, the respondent, Wilbur L. Loftus, filed in the United States District Court for the Southern District of Indiana, New Albany Division, his verified motion to dismiss the petition of the debtor, Charles A. McCulloch, petitioner herein, which was filed by said McCulloch under and pursuant to Section 75 of the United States Bankruptcy Act, on the ground that said McCulloch was not a farmer within the meaning of subsection (r) of said Section 75. (R. 1, 2.) On June 27, 1939, the District Court referred the verified motion to dismiss to Wilmer T. Fox, Jeffersonville, Indiana, as a special master in chancery, who was directed to take testimony concerning the same and report said testimony with his findings of fact and conclusions of law thereon to the court. (R. 2.) On July 21, 1939, the special master heard the evidence and on September 8, 1939 found the facts specially and reported his conclusions of law in favor of respondent. (R. 74 to 81.) On October 9, 1939, respondent filed his motion to confirm the special master's report and, after a hearing thereon, the District Court on the 16th day of October, 1939, adopted the special findings of fact of the master, theretofore filed on September 8, 1939, and at the same time filed conclusions of law to the effect that the debtor was not a farmer within the meaning of subsection (r) of Section 75 of the Bankruptcy Act, as amended, and that respondent's motion to dismiss debtor's petition should be sustained. (R. 74 to 80, 81.) On the same date an order was entered in the District Court in conformity with the said conclusions of law. (R. 81.)

On November 13, 1939, the debtor filed his petition for appeal, together with an assignment of error. (R. 82, 83.) On December 29, 1939, he filed an appeal bond in the sum of $250.00 which was approved by the court. (R. 87, 88.) On February 5, 1940, he filed his praecipe for record on appeal. (R. 88, 89.)

On July 2, 1940, the United States Circuit Court of Appeals for the Seventh Circuit handed down a *per curiam* opinion, which reads as follows:

> "This bankruptcy proceeding was previously before us, on other questions, 100 F. (2d) 939. We reversed an order of the District Court striking real estate belonging to the debtor from his schedules filed in a proceeding under section 75, on authority of *Wright* v. *Union Central Life Insurance Company*, 304 U. S. 502, and remanded the cause for further proceedings. We there called attention to the fact that the record did not disclose that any inquiry was made as to whether the debtor in fact was a farmer as defined in section 75(r) of the Bankruptcy Act.
>
> "The proceeding is again before us on the debtor's appeal, and again the debtor did not appear at the hearing in this court, either in person or by attorney. The sole question raised is whether the debtor was a farmer at the time he filed his petition, and subsequently. The District Court found the facts specially and quite fully, and concluded and decreed that the debtor was not a farmer.
>
> "The findings are supported not only by material evidence but by a preponderance of all the evidence. The findings are not erroneous and we are not permitted to disturb them. The conclusions of law are correct, the decree properly follows them, and it is affirmed."

II.

Summary of Argument.

The respondent submits that the petition of Charles A. McCulloch for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied for each of the following reasons:

1. Petitioner has failed to comply with the Rules of this Court in each of the following particulars:

(a) No certified transcript of the record in the case was filed, as required by Section 1 of Rule 38.

(b) The petition does not contain a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ, as required by Section 2 of Rule 38.

(c) Petitioner's supporting brief does not comply with Rule 27, in that it does not contain a subject index, table of cases, or a reference to the official report of the opinion delivered in the Seventh Circuit.

(d) A copy of the printed record was not served on counsel for the respondent, as required by Section 3 of Rule 38.

2. No adequate reasons are given by petitioner in support of his petition for writ of certiorari.

(a) None of the reasons relied upon by petitioner come within the provisions of subsection (b) of Section 5 of Rule 38.

(b) Although petitioner, on page 1 of his brief, gives as his first reason that a constitutional question is involved, nevertheless the record, as well as his brief, shows that the only question involved is one of fact—was petitioner a farmer within the meaning of subsection (r) of Section 75 of the United States Bankruptcy Act, as amended.

Said Section 75, subsection (r), reads as follows:

> "For the purposes of this Section, Section 4 (b) (11 U. S. C. A., Section 22), and Section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a

farmer shall be deemed a resident of any county in which such operations occur."

Act of May 15, 1935, Chap. 114, Sec. 3, 49 Stat. at L. 246, 11 U. S. C. A., Sec., 203 (r).

(c) Inasmuch as the special master and the District Court made findings of fact to the effect that petitioner was not a farmer within the meaning of said subsection (r) of Section 75, and the Court of Appeals held that the evidence was more than sufficient to support said findings, and further inasmuch as the record discloses that there is in fact ample evidence to support these findings, it is submitted that this court will not grant certiorari.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 178, 58 S. Ct. 849.

First National Bank and Trust Co. v. *Beach*, 301 U. S. 435, 81 L. Ed. 1206, 1208.

III.

Argument.

We deem it unnecessary to point out further the failure of petitioner to comply with the Rules of this Court. A casual reading of his petition and brief clearly reveals the fact that he has failed to comply with Rules 27 and 38 in each of the particulars set forth in our summary of argument. This alone would be a sufficient reason to deny his petition for certiorari.

The only question which was involved in the lower courts was whether the petitioner was a farmer within the meaning of subsection (r) of Section 75 of the Bankruptcy Act. As stated by Mr. Justice Cardozo in the case of *First National Bank and Trust Co.* v. *Beach* (1936), 301 U. S. 435, this question is one of fact to be determined by the court and in every case the totality

of the facts is to be considered and appraised. The special master and the District Court found that petitioner was not a farmer—that he was not "personally bona fide engaged primarily in farming operations" and that "the principal part of his income was not derived from farming operations". The Seventh Circuit Court of Appeals held that these findings were supported not only by material evidence, but by a preponderance of all the evidence. Under these circumstances it is submitted that the writ should not be granted, for it is well settled that this court will not grant a writ of certiorari merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178, 58 S. Ct. 849.

Of course we suppose that if the evidence as revealed by the record failed to sustain the lower tribunals, that this court would have the power to grant the writ because a review on writ of certiorari is a matter of sound judicial discretion, and if the record failed to disclose any substantial evidence to support the lower courts then it could be said that there was a special and important reason why the writ should be granted. But a review of the record in this case will disclose that the Seventh Circuit Court of Appeals was amply justified in stating that "the findings are supported not only by material evidence but by a preponderance of all the evidence."

At the time petitioner sought the protection of Section 75, on July 20, 1937, he was and ever since has been the owner of ten parcels of real estate in Floyd County, Indiana, to-wit:

(1) Lot No. 3 and the south 27½ feet of Lot No. 5 in Plat No. 63 of Floyd County, Indiana. (R. 6.) This property is located on Vincennes Street in the City of New Albany, Indiana, which consists of a two-story brick building and four-room cottage with a basement, and is

of the approximate value of $25,000.00. (R. 6, 7.) From 1923 to 1928 debtor ran a confectionery business in the brick building and in April, 1928 sold this business to Mr. Joe Williams for $3,500.00 and thereafter rented the two-story brick building to Mr. Williams at a rental of $180.00 per month for five years. On June 1, 1933 Mr. Williams moved and debtor had a dispute with him concerning the back rent, which amounted to $1,800.00, and now has a suit pending against Williams for this back rent and for damages done to the building, which suit is still pending. (R. 7 to 10.) At the time Mr. Williams occupied the brick building the debtor also rented the cottage and part of the time received $40.00 per month and later on received $30.00 per month, and at the present time is receiving $20.00 per month. (R. 8 to 10.) Since 1936 the two-story brick building could have been rented for $136.00 per month if it had been placed in repair. (R. 31, 32.) This property is subject to the first mortgage now held by creditor Loftus in the amount of $13,350.00, together with interest and delinquent taxes. (R. 35.)

(2) Lots numbered 29, 31, 33 and 35 of Plat 63, the same being located on Eighth Street in the City of New Albany. There is one house on the four lots and is being rented at the present time for $8.00 per month. (R. 10, 11.)

(3) Four and one-half acres adjoining the New Albany Country Club property. The Country Club is using this property but is not paying any rent. (R. 11.)

(4) Fourteen acres on McDonald Lane (Survey No. 43 of the Illinois Grant in said county and state). There are no improvements of any kind on this property. It is only partially fenced, has not been plowed since 1936, is now in weeds and has been so for the past three years, and debtor receives no rent or income therefrom. (R. 11

to 14.) Debtor stated he entered into an oral contract in 1938 with George Kaufer to sow barley and lespedeza thereon, said Kaufer to furnish the seed and receive one-third of the crop and the debtor to receive two-thirds of the crop. (R. 12.) However, Kaufer did not plow any of said land in 1938, and up to the time of the hearing of the evidence had done nothing thereon in the year 1939. (R. 12, 13.) Said fourteen acre tract has not been used and has produced no income during the years 1937, 1938 and 1939. (R. 11 to 13.)

(5) An undivided one-half interest in lots numbered 1 and 2 in Plat No. 488 in said city, county and state, subject to street improvement lien and delinquent taxes. This property is located on State Street in said city. At one time this property was owned entirely by the debtor, but about the year 1925 the debtor sold a one-half interest therein to Mr. Earle Embrey and retained one-half interest. This land is within the city limits and a plat has been prepared for the purpose of a subdivision. Debtor and Embrey, as partners, spent a little fortune in laying out streets and grading said land, were instrumental in having the government put a sewer through it, planted shade trees and prepared a plat known as "McCulloch and Embrey", divided the property into eighty building lots and five out-lots, which plat has not yet been spread of record. It is the purpose of debtor and Embrey to sell said lots for revenue purposes, and in preparing the property for sale each partner has spent about $40,000.00, including interest on their money. (R. 13 to 15, 32, 33.)

(6) An undivided one-tenth interest in a forty-four acre farm in said county and state. This is the old homestead in which debtor resided until his mother died in 1928. It is now occupied by debtor's two sisters and he receives no income from his one-tenth interest therein, for the reason that one of his sisters has the right to

receive any income from the property as long as she remains unmarried. (R. 15.)

(7) All that part of the northeast quarter of Section 34, Township 2 south of Range 6 east, which lies north of the Bono Road in said county and state, containing thirty-three acres, except 80 x 160 feet conveyed by deed recorded in Deed Record No. 79, page 497. This is subject to a first mortgage held by Henry Schafer in the amount of $5,500.00, principal and interest, and also subject to delinquent taxes. (See *In re McCulloch—McCulloch* v. *Schafer,* 100 Fed. (2d) 939 (C. C. A. 7th).) This parcel was in the city limits of New Albany until about 1936, but has never been platted. *It is the purpose of debtor to plat this property and sell the lots off and it is by the sale of these lots that he expects to pay off all of his creditors.* This property faces a long road and no streets would be required in platting it. This parcel is now, and for more than four years last past has been, rented as pasture land at $30.00 per month to debtor's brother, Tow McCulloch. Brother now owes debtor $1,335.00 back rent and debtor has never attempted to collect this rent from his brother by bringing suit because of conscientious scruples and has never tried to oust him from the premises. (R. 15, 16.)

(8) Lots 72 and 73 in Plat 353 in said city, county and state. This property is located on Olive and Bono Road in said city and there are no improvements thereon. They are merely vacant lots. (R. 16.)

(9) 1.55 acres in the southwest corner of Township 35, Range 2, on Prospect Street in said city, county and state. This property has no value. (R. 17, 25.)

(10) Lots 64 and 65 in Plat 363 of said city, county and state. This property is located on Indiana Avenue and has but slight value. (R. 26.)

The debtor in his verified amended petition, under oath,

placed the following estimate on the value of the real estate above described:

Parcel No. (1)—Two-story brick building and four room cottage	$25,000.00
Parcels Nos. (2), (3) and (4)—Lots 29, 31, 33 and 35; 4½ acre tract; and 14 acre tract	9,000.00
Parcel No. (5)—Proposed State Street subdivision	22,000.00
Parcel No. (6)—Undivided 1/10 interest in homestead	800.00
Parcel No. (7)—Proposed Bono Road subdivision	25,000.00
Parcel No. (8)—Lots 72 and 73	1,800.00
Parcel No. (9)—1.55 acres on Prospect Street	no value
Parcel No. (10)—Lots 64 and 65 on Indiana Avenue	undetermined
Total	$83,600.00

(R. 77.)

Debtor's wife, Estelle McCulloch, is the owner of a ten-acre tract of land on Hausfeldt Lane in said county and state. (R. 17.) This property, which has a house and barn located on it, was acquired by her through a former marriage. (R. 17, 66.) Since their marriage, eight or nine years ago, they have lived on this ten-acre tract. (R. 17.) In 1938, 9.2 acres were under cultivation—.3 in garden; 4.2 in pasture; 2.6 in corn for grain; and 2.1 in soy beans for hay. (R. 37.) In 1939, .2 of an acre was in garden; 4.2 in pasture; 3.7 in soy beans for hay; and 1 acre in corn for grain. (R. 38.)

Debtor stated that the personal property on the ten-acre tract, and which was listed by him in the schedules attached to his verified petition and consisting of five cows, one heifer, three pigs of the value of $250.00, and a mowing machine, plows, harrow and manure spreader of the value of $300.00, was his personal property. (R. 18, 19.) However, debtor made no return for taxation of any of said

personal property, or of any personal property of any character for that matter, for the years 1936, 1937, 1938 and 1939. On the contrary, all of said personal property was returned for tax purposes in the name of debtor's wife, Estelle D. McCulloch. (R. 18, 19.) William R. Helm, the New Albany Township Assessor, stated that his records for the years 1936 to 1939, both inclusive, disclosed that debtor did not file a personal property schedule for any of those years. (R. 28, 29.) On the contrary, according to Mr. Helm, debtor's wife, Estelle D. McCulloch, filed a personal property list for each of those years; that Estelle D. McCulloch signed the assessment list for each of said years; that in the year 1936 she filed a schedule of personal property for assessment purposes and made oath that she was the owner of the property therein set forth, which consisted of one automobile, $40.00 worth of household goods, two milch cows and three dozen chickens; that in the year 1937 she made out a schedule of personal property, swore to the same and signed it with reference to the personal property which she owned, for assessment purposes, and that said schedule of personal property showed a dog with no value, household goods, five cows, three milch cows and two other cows, and three dozen chickens; that said Estelle D. McCulloch made out, swore to and signed a schedule of personal property for assessment purposes for the year 1938, in which she listed a Buick automobile, $30.00 worth of farming implements, five cows, two heifers and a dozen chickens; and for the year 1939 she made out, swore to and signed a personal property schedule for assessment purposes and listed a Buick automobile, $40.00 worth of farming implements, $100.00 worth of household goods, four milch cows, two other cows and three dozen chickens. (R. 29, 30.) Mr. Helm further stated that while there were quite a few wives who filed personal property schedules he did not

know of any who filed such schedules unless they really, actually claimed the household goods or whatever they were scheduling. (R. 30, 31.) All of said personal property was listed for taxation in said years in the name of debtor's wife—Estelle D. McCulloch—at debtor's request, in his presence, and with his consent. (R. 18 to 22.)

In the years 1938 and 1939 debtor's wife, in order to receive soil conservation payments from the United States Government, signed up for the government soil building program. For the year 1938 she was paid a total of $12.00. The 1939 allotment had not been determined at the time of trial. (R. 35 to 38.)

The ten acre tract of land owned by debtor's wife, Estelle D. McCulloch, and on which she, her father and mother, debtor and their two children reside, was used for garden, soy beans, corn and pasture in the proportions above stated and the balance was occupied by the dwelling and barn. At the time of hearing the evidence there were six milch cows, four calves, a couple of hogs, and a couple hundred chickens on this ten acre tract, which number varied somewhat in the preceding years of 1938 and 1937, but was substantially the same. (R. 18 to 22.) The debtor testified that he milks the cows twice a day, hoes and does different things like that, cuts wood, fixes the fences and sells part of the milk, but that he has been unable to plow for a number of years because of rheumatism. (R. 21, 39, 40, 42, 43, 44, 46, 50, 51, 53, 55, 65, 67.)

Debtor has not kept any record of the income from his real estate holdings, has not kept any record of the earnings on his wife's ten acre tract—either his own, his wife's or their joint earnings. He estimated that the income of the ten acre tract in cash and value of food consumed by the family was $100.00 per month, but he was not able to separate the portion produced by his labors from that

produced by his wife from her labors and from her ownership of said tract. (R. 21 to 24.)

For thirteen years prior to the year 1930 the debtor held, in the order named, the office of Trustee of New Albany Township, Treasurer of Floyd County, and Assessor of New Albany Township. (R. 27.) From 1923 to April, 1928 the debtor was engaged in the confectionery business in the City of New Albany. (R. 8.)

It will thus be observed that the evidence conclusively shows that debtor is not personally bona fide engaged primarily in farming operations. Debtor is not engaged in farming any of the ten pieces of property owned by him. The only property which debtor owns, which in any sense of the word could be classified as farm property, is the fourteen acre tract of land (Parcel No. (4)), which is only partly fenced, has no improvements thereon, has been in weeds for three years and has not produced any income during said period of time. All the rest of debtor's property consists of a business building, residences, vacant lots, a subdivision and certain acreage which he intends to make into a subdivision. He does not own any farm personal property of any kind, and the mere fact that he performs some of the functions of a farmer, such as milking, cutting weeds, gardening and building fences, is not sufficient to qualify him as a farmer within the meaning of Section 75(r). *Sherwood* v. *Kitcher* (2nd C. C. A.) 86 Fed. (2d) 750, cert. denied 301 U. S. 703; *Baxter* v. *Savings Bank of Utica, New York* (5th C. C. A.) 92 Fed. (2d) 404, 406; *Re Noble* (D. C. N. J.) 19 F. Supp. 504. Even if it be assumed that debtor does "farm" the ten acre tract belonging to his wife, yet this operation is on too small a scale and the acreage is not large enough to show that he is in fact a farmer within the meaning of said Section, especially when the nature and character of his real estate holdings are taken into consideration. *First National*

Bank and Trust Co. v. *Beach,* 301 U. S. 435, 81 L. Ed. 1206, 1208; *Swift* v. *Mobley* (5th C. C. A.) 28 Fed. (2d) 610.

The evidence conclusively shows that the principal part of debtor's income was not derived from farming operations. If any income was derived from the operation of the ten acre tract upon which debtor and his wife and children reside, then such income belonged to the wife, inasmuch as she is the owner of this land, as well as the owner of the farm implements and livestock and poultry. He kept no books or records to show what his income was and had no explanation of why no books or records were kept. In the schedules which he filed at the time of filing his petition for compromise and extension of his debts, he placed a total valuation of $83,600 on the ten parcels of property. At the time of trial he claimed to farm only one of these parcels, the fourteen acre tract on McDonald Lane which could not possibly be worth more than $1,600.00. So we have the very significant fact that he is the owner of $82,000.00 of non-farm property, as against $1,600.00 of farm property.

It is impossible for us to understand how petitioner can find any comfort or assistance in the case of *First National Bank and Trust Co.* v. *Beach* (1936) 301 U. S. 435. We deem it unnecessary to point out the factual differences between the instant case and the Beach case, but believe it sufficient to say that the description of Francis E. Beach at page 436 of the opinion is utterly different from that of petitioner McCulloch. Even if it be assumed that petitioner's activities on the ten acre tract belonging to his wife are sufficient to show that he does cultivate the soil, yet it is on too small a scale and the acreage is not large enough to show that he is in fact a "farmer" within the meaning of Section 75(r) of the Bankruptcy Act. As stated by Mr. Justice Cardozo in the Beach case,

at page 439, the debtor must work "an acreage large enough to count".

No federal question is involved. The decision of the Seventh Circuit Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals. An important question of general law has not been decided in a way probably untenable or in conflict with the weight of authority. A federal question has not been decided which is in conflict with the applicable decisions of this court. The lower courts did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this court's power of supervision. There is no question involved in the instant case of such gravity or importance as to require review by this court.

Respectfully submitted,

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